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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NOVELTIES DISTRIBUTION CORPORATION and NEW JERSEY MANUFACTURERS INSURANCE COMPANY,

Employer/Carrier Petitioners,

v.

ANTHONY MOLEE and DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Claimant and Federal Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented for Review

1. Was the United States Court of Appeals for the Third Circuit correct in holding that the claimant Anthony Molee and the employer Novelties Distribution Corporation were a covered employee and employer respectively under 33 USCA §§902 (3) and 902(4) of the Longshoremen's and Harbor Worker's Compensation Act?

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Opinions Below

The decision of the Administrative Law Judge is unreported and is appended hereto as Appendix C.

The decision of the Benefits Review Board is unreported and is appended hereto as Appendix B.

The decision of the Court of Appeals is reported at 710 F2d 992 and is appended hereto as Appendix A.

Constitutional and Statutory Provisions Involved

United States Constitution, article III, §2.

Designation of corporate relationships.

Petitioners Novelties Distribution Corporation and New Jersey Manufacturers Insurance Company, filing this petition for writ of certiorari as petitioners in this proceeding state that:

This is their original Designation of Corporate Relationships.

Novelties Distribution Corporation is a wholly owned subsidiary of Maher Terminals, Inc.

New Jersey Manufacturers Insurance Company is not owned by any parent corporation.

Said petitioners do not have any ownership interest in any subsidiary (excepting only wholly owned subsidiaries).

Said petitioners do not have any affiliates.

Dated: September 15, 1983.

Grounds on which jurisdiction of this Court is invoked.

The proceedings below involve a claim for compensation benefits by Claimant-Respondent under the Longshoremen's and Harbor Workers Compensation Act (33 U.S.C. §901 et. seq.). On August 11, 1977 claimant sustained an accidental injury arising out of and in the course of his employment by the employer. The employer commenced voluntary payments of compensation under the Compensation

Laws of the State of New Jersey. Thereafter claimant contended that payments should have been made not under the Compensation Law of the State of New Jersey but under the Longshoremen's and Harbor Workers Compensation Act, and made claim for his injury with the United States Department of Labor for compensation under that Act. Employer and carrier opposed the claim under the Longshore Act contending that neither claimant nor the employer came under the jurisdiction of the Act. After trial of the issues before an Administrative Law Judge of the United States Department of Labor, the Administrative Law Judge by decision dated September 16, 1980, ruled in favor of the claimant that his accidental injury did come under the coverage of the Longshore Act. In the Administrative Law Judge's decision awards under the Act were made to the claimant for both temporary and permanent disability. There is no issue as to the amounts or correctness of the awards if this claim is properly one under the jurisdiction of the Act.

The employer and carrier duly appealed these rulings and awards to the Benefits Review Board pursuant to 33 U.S.C. §921 (a)(b). The Benefits Review Board by decision and order filed June 22, 1982 affirmed the Administrative Law Judge's decision ruling and awards made under the Longshore Act. The employer and carrier petitioners herein thereupon appealed to the Court of Appeals. The United States Court of Appeals for the Third Circuit by decision filed on June 29, 1983 held that the claimant and his employer came under the jurisdiction of the Act. Employer and Carrier petitioners herein appeal from this decision of the United States Court of Appeals for the Third Circuit which judgment was dated and entered on June 29, 1983.

The statutory provisions conferring jurisdiction on this Court to review the judgment in question is 28 U.S.C. §1254 (1).

Constitutional and statutory provisions involved.

United States Constitution, article 111 §2.

> "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the loss of the United States, and treaties made, or which shall be made, under their authority; . . . To all cases of admiralty and maritime jurisdiction . . ."

33 U.S.C. §902 (3)(4)—Refer to Appendix D for text of these provisions.

33 U.S.C. §903 (a)—Refer to Appendix D for text of this provision.

33 U.S.C. §921 (b)(3)—Refer to Appendix D for text of this provision.

28 U.S.C. §1254(1)—Refer to Appendix D for text of this provision.

Statement of the Case

On August 11, 1977 Anthony Molee, Claimant-Respondent herein, hereinafter referred to as claimant, was in the employ of Novelties Distribution Corp., employer-petitioner, hereinafter referred to as Novelties. On that date claimant sustained an accidental injury arising out of and in the course of his employment by Novelties.

Novelties operates a lumberyard at the premises of the Port Newark and Elizabeth Port Authority Marine Terminal (9, 10) (please note that in this petition numerals placed in parenthesis as citation, unless otherwise specifically identified, are references to the page numbers of the Appendix filed below with the United States Court of Appeals).

Novelties lumber operation occupies two areas: "Berth 78", a 10 acrea area directly adjacent to the water, and a 16 acre, "Bay Avenue Area," approximately 2,500 feet inland.

The lumber at Novelties lumberyard comes to Novelty by sea or railroad deliveries. The lumber that is received by Novelties by rail comes to the Bay Avenue area because there are no rail tracks going down to the Berth 78 area (58, 63). The lumber that comes by sea journey goes to the Berth 78 area. When Novelties receives the lumber, this receipt is on behalf of the consignees of the lumber shipments (58). The consignees who own the lumber do not direct further shipment of the lumber from the Novelties yard to any premises or yards owned by the consignees. Rather the consignees sell the lumber directly to their customers and then the customers of the consignees come down to the Novelties yards to pick up the lumber which has been sold by the consignees to such customers (56, 57, 58).

When the consignee makes a sale it calls this in to Novelties by Telex or telephone and directs Novelties to release the lumber to the specific customer (57). The lumber that is picked up by the customer's truck is not segregated or in any way affected by whether the lumber had reached Novelties yard by sea or rail—all that matters is the delivery to the consignees customer of the correct amount, species, length and size of the lumber (62, 63).

When a consignee's customer comes to the yard to pick up lumber that the customer has already bought from the consignee, in order to take possession of the lumber, the truck driver first goes to the office in the Bay Avenue area and is given a slip to pick up the correct type of lumber that was sold to the customer. Then the truck driver is directed to either go into the Bay Avenue area or the Berth 78 area depending upon the size, type, species and amount

of lumber that he is to get. The location where the truck driver is sent to pick up the lumber that he has been authorized to take away has nothing to do with whether the lumber was delivered to Novelties by rail or sea.

When a ship arrives at Berth 78 and ties up at the string piece, longshoremen employed by the stevedore Maher Terminals Inc., unload the lumber from the ship and place it on the string piece (23, 24, 69, 70). Thereupon Novelties employees take possession of the lumber as and on behalf of the consignees and move the lumber into the Novelties Berth 78 lumberyard (24, 55, 56).

The employees of Maher Terminals, Inc. who work in the stevedoring operations of that corporation do not work in the lumber storage areas of Novelties (71). The men who work for Maher Terminals, Inc. belong to a different union local of the ILA than does the claimant (68, 69). The claimant belongs to the warehouse division local (69). These members of that warehouse union do not participate in the tasks performed by Maher Terminals, Inc. with respect to the removal of lumber from a ship (70).

The employees of Maher Terminals, Inc. the stevedore, do take cargo from ships, handle the containers, and remove cargo from ships and bring it to holding warehouses, but these people are *not* used in the storage and lumber activities of Novelties (70, 71).

The record establishes that customarily and traditionally this has always been so. The handling of lumber is by members belonging to the warehouse union which have always been different from those that belong to the longshoreman union who load and unload ships (71).

After the longshoreman of Maher Terminals, Inc. move the lumber from the ship and place it on the stringpiece, it is Novelties' employees who take possession of the lum-

ber on behalf of the consignee and these employees are not considered longshoremen (72, 73, 24).

When Novelties' employees take possession of the lumber at the stringpiece they then move it to the Berth 78 area where claimant is stationed (30, 31). It is then claimant's job to direct Novelties' employees who are bringing the lumber into the Berth 78 storage area, to place it and organize it in such a fashion that it will be available for appropriate removal at a later date by consignee's customers (34, 35). It was while engaged in this activity that the claimant sustained the accident which is the basis of this claim (32).

The claimant has testified that he always worked in the same location at Berth 78 except for a day or so during the year when he would go to the Bay Avenue area to participate in taking inventory for Novelties (41, 42).

Furthermore the record is clear that the Novelties lumberyard is no different from any other lumberyard regardless of the fact that the Novelties yard happens to be located adjacent to navigable waters. There is nothing in the record to suggest that the Novelties' yard was set up or functioned any differently from any lumber yard that operates inland. The mere geographical coincidence of the fact that Novelties lumber operations is located adjacent to the water should not be and is not sufficient basis for holding that Novelties and its employees come under the jurisdiction of the Act.

POINT I

Neither the claimant nor the employer are engaged in maritime employment and therefore do not have the status of employer or employee under the Act.

It must first be emphasized that it had never been the intention of the Congress to cover all workers merely because they are injured on a covered situs. In discussing the legislative intent of the above provisions, the Congressional Committee report stated

> The committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activities. Thus employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. SRep 13; HR Rep 10-11.

This legislative statement was underscored in the holding by the Supreme Court in the seminal decision of *Northeast Marine Terminal Company, Inc.* v. *Caputo*, 432 US 249 (1977) (hereinafter referred to as Caputo/Blundo). In that case referring to the legislative reports the Court stated "the example also makes it clear that persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truck drivers whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered". *Caputo/Blundo*, supra at 267.

In the case of *P. C. Pfeiffer Co.* v. *Ford* 444 US 69 (1979) this Court further analyzed the status requirement of the Act particularly with regard to the term "maritime employment". In its analysis the Court noted that "one of the reasons Congress expanded coverage in 1972 was that containerization permits loading and unloading tasks *traditionally conducted aboard ship* to be performed on the land. Such tasks are "longshoring operations" *P. C. Pfeiffer Co.* v. *Ford, supra,* at 69. (Emphasis added). The Court also noted that the claimant Caputo whose claim was the subject to its prior decision in *Caputo/Blundo,* sustained his injury while lowering a loaded dolly into a consignee's truck. Referring to its earlier decision the Court stated "accordingly, the Court did not have to decide whether Caputo's work was "maritime employment" simply because he was "engaged in the *final steps of moving cargo from maritime to land transportations putting it in the consignee's truck." P.C. Pfeiffer Co.* v. *Ford supra* 444 US 69 (emphasis added).

The Court further held that §2(3)'s explicit use of the terms "longshoreman" and "other persons engaged in longshoring operations, to describe maritime employment demonstrates that workers doing tasks *traditionally performed* by longshoremen are within purview of the 1972 Act." *P. C. Pfeiffer Co.* v. *Ford, supra,* at 69.

The Court also emphasized that the term "maritime employment" is entirely an occupational rather than geographical concept, and referred to portions of the legislative history to support this holding. *P. C. Pfeiffer Co.* v. *Ford, supra* 444 US 69. It is thus clear in analyzing the Supreme Court's holdings and applying them in an integrated manner, that an employee is engaged in maritime commerce and therefore covered by the Act only when he is handling and transporting cargo up to the

time that he places it in the hands of the consignee. Furthermore we see that the Court had interpreted the expansion of coverage under the Act through the 1972 amendments to be predicated upon the fact that containerization had rendered more land based certain longshoring activities which had previously been associated more with the ship. The Supreme Court has repeatedly held that the post-containerization work activities of longshoremen must in essence have been the same activities that they "traditionally performed" before containerization.

In *Caputo/Blundo* the Supreme Court stated

> One of the primary motivations for Congress' decision to extend the coverage shoreward was the recognition that "the advent of modern cargo-handling techniques" had moved much of the longshoreman's work off the vessels and onto land. S Rep 13; HR Rep 10. Noted specifically was the impact of containerization. Unlike traditional break-bulk cargo handling, in which each item of cargo must be handled separately and stored individually in the hold of the ship as it waits in port, containerization permits the time-consuming work of stowage and unstowage to be performed on land in the absence of the vessel. The use of containerized ships has reduced the costly time the vessel must be in port and the amount of manpower reqiured to get the cargo onto the vessel. In effect, the operation of loading and unloading has been moved shoreward; the container is a modern substitute for the hold of the vessel. As Judge Friendly observed below, "[S]tripping a container . . . is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it

> is performed on shore and not in the ship's cargo holds." *Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F2d 35, 53 (CA2 1976). Congress' intent to adapt the LHWCA to modern cargo handling techniques clearly indicates that these tasks heretofore done on board ship, are included in the category of "longshoring operations." (*Northeast Marine Terminal* v. *Caputo, supra,* 432 US 249, 269, 270).

This Court in *P. C. Pfeiffer Co.* v. *Ford, supra* at 444 US 69, 74, reiterated the above analysis stating, "one of the reasons Congress expanded coverage in 1972 was that containerization permits loading and unloading tasks traditionally conducted aboard ship to be performed on the land. Such tasks are 'longshoring operations.' "

However we see in the instant case that the lumber yard activities conducted by Novelties do not have any traditional association with longshoremen or longshoring operations. And we also see that the lumber yard operations of Novelties were conducted as consignee of the lumber brought to the Novelties yard.

We submit that the Third Circuit Court of Appeals in the instant action failed to properly evaluate and consider the above holdings of the Supreme Court and apply them to the uncontradicted facts in this record, namely that Novelties is a typical lumber yard that happens to be located adjacent to navigable waters purely for business convenience, and that when the lumber reached Novelties it directly entered the hands of the consignees. Therefore the maritime shipment ended when Novelties took possession of the lumber thus in effect the consignee received such lumber for its own land based purposes.

In evaluating the entire picture as to whether a particular person is engaged in martime employment it must be

borne in mind that maritime employment refers to maritime transportation and cargo handling which is simply a shipment from someplace overseas to a consignee based on land. We submit that the whole concept of maritime commerce both logically and practically compels a conclusion that when the cargo has reached the hands of the consignee or his agent, that is the end of the maritime voyage.

The fact that the consignee's then sell the imported cargo, to other people does not prolong the maritime shipment.

The shipment ends and the maritime nature of handling cargo terminates when the consignee receives it for its own land based purposes. Thus as this Court has uniformly held, when a consignee's truck driver arrives at the terminal and cargo taken from a ship is given to the truck driver, from that point the transfer of the cargo to the consignee has been effected and that is the end of the sea voyage, the maritime nature of the shipment has terminated.

The Supreme Court emphasized this concept in the *Caputo/Blundo* decision when considering whether cargo still remained in maritime jurisdiction when five days had elapsed following the removal of the cargo from a ship to the time that the consignee's truck driver came to pick up the cargo. The Supreme Court as mentioned above held that the lapse of time did not remove the cargo from maritime jurisdiction and defined the ending of longshore jurisdiction to be that point when the character of the work effectuates the transfer of the cargo to the consignee or the consignee's truck driver. *Northeast Marine Terminal Co.* v. *Caputo*, 432 US 249, 274 Note 37.

Thus the Court of Appeals' holding in the instant action that "it is more in keeping with the overall functional approach of *Johns* [*Sealand Service* v. *Director* (Johns) 540 F2d 629] to say that Novelties is engaged in maritime com-

merce because it operates as an integral unit with Maher than is to say that Novelties is engaged solely in land-based activity because it maintains a separate corporate identity from Maher and is an agent of the consignee's", does not meet petitioners above contentions and is an improper and unsupported evaluation of the factors described above and not only without evidentiary support but contrary to the uncontradicted evidence. There is nothing in the record that even suggests Novelties is more than a land based lumber yard, or that it has anything other than a traditional lumber yard operation that happens to be located near the waterfront, and to ignore or obscure that fact and attempt to merge the activities of Novelties with the stevedoring operation of Maher is not supported by any evidence in the record and is an error of law. It is not just a coincidence that this lumber does reach the hands of the consignees as soon as Novelties receives it, but it is in keeping with the traditional lumberyard business that Novelties performs. Moreover, there is not a scintilla of evidence in the record to even hint that the separation of the lumber yard from the stevedoring operations performed by Maher Terminals is a contrivance or attempt by Novelties to avoid coverage under the Act; on the contrary all the evidence indicates as a practical matter that this is the way a lumberyard such as Novelties would function.

If in fact the consignee's truck had picked up lumber at the stringpiece and carried it across the street to the consignee's premises, once the consignee's truck driver received the cargo in his hands that would be the end of maritime transfer of the cargo, and further movement would be landbased movement beyond the jurisdiction of the Act. The mere fact that Novelties' employees do not use trucks but rather use other types of lumberyard handling equipment does not mitigate this basic element, that the handling by Novelties' employees, even through on the stringpiece

and close to the side of the ship where a stevedore has unloaded the lumber, is not part of the unloading process but instead the first step of landbased character and transportation of the cargo.

It is the Court of Appeals failure properly to deal with these above issues and to adhere to the analysis developed by the Supreme Court in the *Caputo/Blundo* and *Pfeiffer* cases that makes it extremely important that the Supreme Court grant certiorari in this matter to provide proper interpretation and guidance.

If this decision of the Court of Appeals is left to stand, it would result in a wide reaching expansion of coverage under the Act never intended by Congress so as to render a host of landbased businesses never traditionally considered maritime in nature, subject to such coverage. Because of the widely expansive definition of coverage under the Act offered by the decision appealed from, we urge that review by the Supreme Court of the United States is clearly necessary and required. The decision appealed from has and will have repercussions that are nationwide and contrary to Congress' intentions as interpreted by this Court. Accordingly we submit that review of this decision by this Court is both indicated and essential to ensure uniform, appropriate and controlled application of the Longshore Act to areas intended by Congress to be affected by the 1972 amendments and to prevent unwarranted intrusions into and burdens upon businesses and activities clearly not meant to come within the purview of the Act.

Petitioners also submit that the Court of Appeals in Part 3 of it's decision fails properly to adhere to the decision of the Supreme Court in *Director, OWCP* v. *Perini North River Assoc.*, 103 S.Ct. 634, 646 N. 24, hereinafter referred to as *Perini.*

The record establishes without contradiction that none of Novelties' employees actually go onto ships or actually unload the lumber from the ships or go onto the actual navigable waters. *None* of Novelties' employees go upon the actual navigable waters of the United States as defined prior to the 1972 amendments.

In *Caputo/Blundo,* 432 U.S. 249, 266, N. 27 the Court, referring to legislative committees' reports quotes the following:

> "Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e., a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters".

In the recent *Perini* case, supra, the essential issue was whether the claimant, who would have been covered under the Act prior to 1972 was excluded from coverage after the 1972 amendments. In its analysis the Court determined that the claimant was a marine construction worker injured upon actual navigable waters in the course of his employment (103 S. Ct. 634, 641). In its evaluation and conclusion the Court held that the claimant while engaged in employment on the actual navigable waters, was engaged in a maritime endeavor and therefore came under the post 1972 Act's coverage. In reaching its conclusion the Supreme Court held that a claimant not only must satisfy the status requirements of §2(3) as an "employee" under the Act, but also that he also be "in the employ of a *statutory employer*"; the Supreme Court referred in note 24 at page 646 of its decision that the

definition of an employer in the Act did require that at least some of his employees be engaged in whole or in part in some form of maritime employment upon the actual navigable waters of the United States. The Note in the *Perini* decision specifically states:

> "Thus an individual employed by a person none of whose employees work, in whole or in part on the navigable waters is not covered even if injured on a pier adjoining navigable waters". (S Rep at 13: H Rep at 11 US code Cong. and Admin. News 1972 P. 4708). We note that there is an apparent inconsistency between the actual wording of §2(4) and the expression of the legislative history. §2(4) defines "an employer" to be the employer of any employee engaged in maritime employment on the "navigable waters" as defined by the 1972 amendments to include the expanded language situs. The legislative history however appears to *contemplate that a statutory employer must have at least one employee working over the actual navigable waters before any employee injured on the new land status can be covered.*" (emphasis added).

It is this quotation and the accompanying statement as to the necessity of an employer's having at least one employee working upon the *actual navigable waters* of the United States, which we submit is an additional basis for holding that this claim before you does not come under the jurisdiction of the Act. We see that there is complete unanimity of evidence in the record that Novelties does not have any employees who work upon the actual navigable waters. Therefore separate from and independent of any of the aforementioned arguments, it is petitioner's contention that since Novelties does not have any employees working upon the actual navigable

waters of the US, that the Supreme Court's above evaluation should have been followed by the Court of Appeals and the claim disallowed on that basis as well in that the employer Novelties is not an employer within the coverage of the Act as required under the definitions of 33 USC §902(4).

Appellants further submit that the Court below not only exceeded its power of review but violated its obligations that its conclusions must be supported by substantial evidence (cf 33 USC §921).

We submit a glaring example of this is to be found in footnote 4 of the decision of the Third Circuit herein appealed from. In this footnote they correctly refer to the legislative history which includes the statement "However checkers for example who are directly involved in the loading or unloading functions are covered by the new amendments." The Court then states "Molee's uncontroverted testimony is that he was a 'checker' ". We submit that this is not Molee's uncontroverted testimony. Instead Molee admitted that he had no official title (31) and his actual job was to organize lumber in the storage area so that when the lumber was needed to be taken out it could be located (34) that no matter what name was attached to this, checker, location man, no matter what he was called it was his job to organize placement of the lumber so that the lumber would be available when it was needed to be taken out (34, 35). We submit that this is an attempt by the Court in arriving at its conclusion of compensability to extract a label from the legislative history and from decisions and apply it in a meaningless way to the record in this case.

CONCLUSION

For the foregoing reasons neither the claimant nor the employer are covered by the Act, and the decision of the Court below holding that each does come within coverage under the Act, is not supported by substantial evidence in the record, is contrary to the uncontradicted evidence, is completely in error as a matter of law, and for this reason we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Member of the Bar of this Court)
LINDEN & GALLAGHER
Attorneys for Employer/Carrier Petitioners

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-3376

NOVELTIES DISTRIBUTION CORPORATION

and

NEW JERSEY MANUFACTURERS INSURANCE COMPANY,

Petitioners

v.

ANTHONY MOLEE

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

ON PETITION FOR REVIEW OF AN ORDER OF THE BENEFITS REVIEW BOARD
BRB NO. 80-1164

Argued March 16, 1983

Held C.A.V. until April 11, 1983

Before: ADAMS and GARTH, *Circuit Judges*, and ACKERMAN, *District Judge**

(Filed June 29, 1983)

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* Honorable Harold A. Ackerman, United States District Court for the District of New Jersey, sitting by designation.

Appendix A

LEONARD J. LINDEN (Argued)
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OPINION OF THE COURT

ADAMS, *Circuit Judge.*

Novelties Distribution Corporation (Novelties) and its insurance carrier, New Jersey Manufacturers Insurance Company, petition for review of an order of the Benefits Review Board (Board), affirming a decision of an Administrative Law Judge (ALJ). The ALJ and the Board granted benefits to Anthony Molee, a Novelties employee, pursuant to the Longshoremens' and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §901-50. Petitioners argue that Molee's claim was not covered by the Act because Molee was not engaged in "maritime employment" within the meaning of 33

U.S.C. §902(3) and Novelties was not an employer under 33 U.S.C. §902(4). For the reasons set forth below, we will affirm.

I

Novelties is in the business of receiving, warehousing, and distributing lumber. It is a wholly owned subsidiary of Maher Terminals, Inc. (Maher), a stevedoring company. Novelties' lumber operation occupies two areas: Berth 78, a ten acre area directly adjacent to the water, and a sixteen acre "Bay Avenue Area," 2500 feet inland. Molee spent virtually all his working time on Berth 78 and at most one day a year at the larger area, taking inventory.

When ships anchored at Berth 78, Maher's employees would unload lumber from the vessel to the "stringpiece," the edge of the dock closest to the ship. Novelties' employees would then move the lumber from the stringpiece to the storage area. Molee testified that, although he had no official job title, he was a "checker" or "location man." App. 30-31; 34-35. He explained that his "work was always checking, checking trucks, checking the lumber off the ship. . . ." App. 49, 60, 30-31, 34-35. Molee would normally be stationed somewhere in the middle of Berth 78. Although he would sometimes work alongside the stringpiece, "any movement he may have made would end at the water's edge." App. 28.

On August 11, 1977, Molee was performing his usual job of directing and organizing the placement in Berth 78 of lumber that was being removed from a ship, when he was struck and run over by a lift truck bringing lumber from the stringpiece. It is stipulated that Molee was totally disabled by the accident.

Because the parties were unable to agree that Molee was covered under the LHWCA, the matter was referred to an ALJ for hearing and decision. *See* 33 U.S.C. §919. The ALJ found in favor of Molee and ordered that pay-

ments be made under the Act. Molee, the ALJ explained, "played an integral and essential role in the longshore process" and, therefore, was an employee covered by the Act. App. 102. The Board affirmed this decision. 15 Ben. Rev. Bd. Serv. 1 (1982). The employer and its insurance carrier petitioned for review under 33 U.S.C. §921(c) on the grounds that neither Molee nor Novelties is covered by the LHWCA.

II

Petitioners assert that Molee functioned as an agent of land-based consignees, that he did not engage in maritime employment, and, consequently, that he was not covered by the Act.[1] Their argument is based principally on the fact that Novelties, because of its separate corporate identity from Maher, is an agent of the consignees and not of the stevedoring company. Molee urges that the nature of his work brings him under the Act, regardless of how Novelties, Maher, and the consignees choose to structure their legal relationships.

When Novelties' employees take possession, the cargo has in effect, according to petitioners, already

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1. Section 903(a), entitled "Coverage," reads in pertinent part:

Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employee in loading, unloading, repairing, or building a vessel.

Section 902(3) provides:

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

been delivered to the consignees. The trucks that take the lumber from the stringpiece for storage in Berth 78 are, according to petitioners, the first step in the land-based transportation of the cargo. Novelties stresses that it does not deliver cargo stored in Berth 78 to the consignees. Rather Novelties insists that the stored cargo has already been delivered to the consignees as soon as Novelties takes possession, and that, when Novelties releases it for further transshipment, it gives the cargo to the customers of the consignees. By divorcing itself from Maher, Novelties has, in its view, transformed its employees, including Molee, from longshoremen into completely land-based lumberyard workers.[2] This argument reintroduces the type of checkered, arbitrary coverage that Congress labored to eliminate in amending the Act in 1972, and runs counter to the liberal spirit in which "coverage" is to be construed.

In 1972 Congress addressed "the continuing anomaly that the schedule of benefits to be applied in any case depended on whether the injury occurred on the land or water side of the gangplank."[3] *Sea-Lane Service, Inc. v. Director, Office of Workers' Compensation Programs (Johns)*, 540 F.2d 629, 633 (3d Cir. 1976); *P.L. Pfeiffer Co. v. Ford*, 444 U.S. 69, 72-73 (1979). In place of a 'situs' test of eligibility for compensation, Congress substituted a two-part test "looking both to the 'situs' of the in-

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2. The record on the question of agency is undeveloped, and the ALJ made no findings on this issue. The Board conclusorily stated that Novelties "acts as the agent of the consignee." App. 91. Because we hold that Molee's claim falls within the Act, even if he is an agent of the consignees, we will express no view on the agency issue or on the stage at which the consignees obtain possession.

3. The historical background of the 1972 Amendments has been recited many times, and little detail need be presented here. *See Director, Office of Workers' Compensation Programs v. Perini North River Associates*, ___ U.S. ___, 103 S.Ct. 634, 641-651 (1983); *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 717-26 (1980).

jury and the 'status' of the injured." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264-65 (1977).

Petitioners contend that Molee fails the "status" test imposed by the 1972 Amendments. Cases decided under the "status" test make it apparent, however, that Molee was engaged in "maritime employment" within the meaning of the amended section 902(3), regardless of whether he was an agent of the consignee. In construing the coverage of section 902(3), it must be recognized that

> [t]he language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation. The Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.' *Voris v. Eikel*, 346 U.S. 328, 333 (1953).

Caputo, 432 U.S. at 268.

Caputo and *Ford*, the two Supreme Court decisions dealing with the landward reach of the 1972 Amendments, decisively reject the "point of rest" theory that maritime employment includes "only the portion of the unloading process that takes place before the stevedoring gang places cargo onto the dock." *Ford*, 444 U.S. at 75; *Caputo*, 432 U.S. at 274-79. Under the point-of-rest doctrine, Molee would not be a covered employee, for his work commenced only after the cargo had reached a "point of rest" on the stringpiece. The ALJ and the Board held that Molee was involved in the overall unloading of ships, indeed that Molee, in the ALJ's words, "played an integral and essential role in the longshore process," App. 102, and that only a reliance on the discredited point-of-rest doctrine could yield a contrary result. Petitioners insist that their position does not depend on the point-of-rest thesis. In their view, the Supreme Court in rejecting "point of rest" never intended

to extend "maritime employment" to encompass workers who are agents of land-based consignees, even when those workers take cargo on the seaward edge of the dock and store it in an area adjacent to the water. Whether or not the Supreme Court's rejection of the point-of-rest idea is itself dispositive, the reasoning of *Caputo* and, to an even greater extent, *Ford* make clear that Molee is an employee covered by the statute because he is "engaged in longshoring operations." *See Perini, supra* note 3, ____ U.S. at ____, 103 S.Ct. at 648 n.27.

Both claimants in *Caputo* were held to be statutory employees. Carmelo Blundo was, like Molee, a checker, "responsible for checking and recording cargo as it was loaded onto or unloaded from vessels, barges, or containers." 432 U.S. at 252-53 (footnote omitted). The Supreme Court determined that Blundo's task was "an integral part of the unloading process." Ralph Caputo, a member of a longshore crew, had been assigned at various times to a number of operations, but Congress' intent to eliminate "shifting and fortuitous" coverage dictated that he be considered an employee under the Act. *Id.* at 274. Relying on a "typical example" of the coverage explained in the legislative history,[4] the Court found

4. According to the legislative history:

> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. . . . [E]mployees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the

a congressional "intent to cover those workers involved in the essential elements of unloading a vessel. . . ." 432 U.S. at 267.

Ford interpreted *Caputo* expansively. The claimants in *Ford* did not perform any work over navigable waters; yet the Court held that they were engaged in maritime employment for "[t]he term 'maritime employment' refers to the nature of a worker's activities." 444 U.S. at 78. Congress, the Court explained, had "anticipated that some persons who work only on land would receive benefits under the 1972 Act":

> the usual longshoring crew includes some men whose duties may be carried out solely on the land. A typical loading gang consists of persons who move cargo from a warehouse to the side of a ship, frontmen who attach the load to the ship's gear for lifting aboard the vessel, and a hold gang which stores cargo inside the ship. Although the workers who carry the cargo to shipside and the frontmen who attach the cargo to the lifting devices need not board a ship to carry out their duties, they are incontestably longshoremen directly engaged in the loading process.

Id. at 80-81 (footnote omitted).[5] In a similar vein, the Court stated that "[p]ersons moving cargo directly from ship to land transportation are engaged in maritime em-

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NOTE — *(Continued)*

loading or unloading functions are covered by the new amendment.

S. Rep. No. 92-1125, 92nd Cong., 2d Sess. 13 (1972); H. Rep. No. 92-1141, 92nd Cong., 2d Sess. 11, *reprinted in* U.S. Code Cong. & Ad. News 4698, 4708. Note the express statement that "checkers" are covered. Molee's uncontroverted testimony was that he was a "checker."

5. *Cf. Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 53 (2d Cir. 1976), *aff'd sub. nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

ployment. . . . A worker responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process." *Id.* at 82-83.

Petitioners argue that in *Ford* no issue was raised as to whether the workers were the agents of the consignees. Petitioners could prevail on this point only if the nature of a harbor worker's activities varies depending on the agency relation between his employer, the employer of the workers who actually perform tasks over the water, and the consignees of the cargo.

It is true that the agency issue was not explicitly raised in *Ford*, but the Court made it unmistakably clear that the test of coverage is to be simple and uniform and not manipulable at the employer's whim. *Id.* at 83-84. *Ford* implies that a test of coverage is unacceptable if it frustates the congressional goals of simplicity and uniformity by making pivotal considerations like an employer's legal relations, rather than the actual nature of the tasks performed. If "the scope of maritime employment [does not] depend upon the vagaries of union jurisdiction," *id.* at 82, it should be equally independent of changeable corporate structures, even if, as petitioners maintain, the separation between the work of Novelties' employees and those of Maher reflects a traditional division of labor in the handling of lumber. *See* Petitioners' Br. 29-30.

Decisions of the Third Circuit do not point to a different result. In *Johns*, we remanded for a determination of whether the claimant was engaged in maritime employment when working as a shuttle driver. *Johns* adopted a "functional" test: "The key is the functional relationship of the employee's activity to maritime transportation, as distinguished from such land-based activities as trucking, railroading or warehousing." 540 F.2d at 638. Under the *Johns*' analysis, federal coverage extends to employees in Molee's situation, who help deliver cargo from the seaward side of the dock to an adja-

cent storage area from which customers may pick up cargo. *Johns'* "functional" approach demonstrates that such coverage is independent of whether the employee is technically the agent of the consignee. The employee's activity, rather than his legal relationship to the consignee, is the critical factor in determining the point at which cargo is ready to be picked up by "the next mode of transportation":

> The line which Congress intended to draw was between maritime commerce and land commerce, and the coverage of the federal law starts at the point where the cargo passes to or from an employer engaged in the former to an employer engaged in the latter. That the one employer may be engaged in both types of commerce is irrelevant. The line should still be drawn where cargo is delivered to a segregated place for delivery to the next mode of transportation.

Id. at 639.

Petitioners rely heavily on the first sentence of this passage, arguing that federal coverage ended when the cargo passed from Maher, an employer concededly engaged in maritime commerce, to Novelties, an employer allegedly engaged solely in land-based activities. This reading of *Johns* cannot withstand scrutiny. The language on which the petitioners base so much of their argument does not purport to define, or even to suggest, when an employer is engaged in land, as opposed to maritime commerce. It simply leaves open the question whether Novelties is an employer engaged in maritime commerce. It is more in keeping with the overall functional approach of *Johns* to say that Novelties is engaged in maritime commerce because it operates as an integral unit with Maher than it is to say that Novelties is engaged solely in land-based activity because it maintains a separate corporate identity from Maher and is an agent

of the consignees.[6] Furthermore, the second sentence of the quoted passage clearly implies that, in ascertaining when cargo passes from a maritime employer to one engaged in land commerce, the corporate identity of the employer has no significance. In any event, Molee's close nexus to maritime activity strongly supports a holding that he passes the *Johns* test.[7]

III.

Petitioners argue that Molee is not covered by the LHWCA because Novelties is not an employer under the Act. Prior to the 1972 Amendments, "employer" was defined somewhat narrowly: "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. §902(4). The crucial expression, "navigable waters," did not encompass land areas. Under that version of the Act, petitioners might well have a sound argument for the position that Novelties is not an "employer." The 1972 amendments, however, greatly expanded the definition of "employer":

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier,

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6. Whether Novelties is an "employer" under the Act is discussed at greater length in Part III of this opinion.

7. Subsequent decisions of this Circuit reinforce our conclusion that Molee is an employee under the *Johns* standard. In *Dravo Corp. v. Maxin*, 545 F.2d 374, 380 (3d Cir. 1976), we held that a claimant involved in a preliminary stage of boatbuilding was a shipbuilder and hence a covered employee. The reality of the employee's work, rather than the labels imposed by the employer, was determinative. *See also Dravo Corp. v. Banks*, 567 F.2d 593, 595-96 (3d Cir. 1977); *Maher Terminals v. Farrell*, 548 F.2d 476, 478 (3d Cir. 1977); *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs*, 552 F.2d 985, 995 (3d Cir. 1977).

> wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. §902(4).

Although Congress clearly meant to widen the reach of the term "employer," the legislative history suggests that there was

> no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, *i.e.*, a person at least some of whose employees are engaged in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on the navigable waters, is not covered even if injured on a pier adjoining navigable waters.

S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972); H. Rep. No. 92-1441, 92d Cong., 2d Sess. 11, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4698, 4708.

The Supreme Court in *Perini*, ____ U.S. at ____, 103 S. Ct. at 646 n.24, after quoting this portion of the legislative history, noted

> . . . an apparent inconsistency between the actual wording of section 2(4) and the expression in the legislative history. Section 2(4) defines an "employer" to be the employer of any employee engaged in maritime employment on the "navigable waters" as defined by the 1972 Amendments to include the expanded landward situs. The legislative history, however, appears to contemplate that a statutory employer must have at least one employee working over the actual navigable waters before any employee injured on the new land situs can be covered.

The Court did not in any way endorse the view seemingly taken by the legislative history. Indeed, it would be ex-

traordinary for a court to adopt a position which the legislative history merely appears to contemplate, rather than follow the statute's actual words. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *United States v. Oregon*, 366 U.S. 643 (1961).

Although the legislative history is ambiguous, it can be properly read to categorize an entity such as Novelties as an "employer."[8] The language of the statute is unproblematic and plainly dictates that Novelties be considered an "employer."

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8. According to the Senate Report:

> Section 2(b) amends section 2(4) of the Act to define an "employer" . . . as anyone whose employees are employed in *maritime employment on the navigable waters* of the United States, *and* to *define navigable waters as including any adjoining pier, wharf, dry dock, terminal*. . . .

S. Rep. No. 92-1125, 92d Cong., 2d Sess. 17 (1972) (emphasis added).

The House version similarly explains:

> Subsection (b) amends the definition of the term "employer" contained in section 2(4) of the Act. Under the amendment . . ., the term "employer" means an employer upon the navigable waters and on any dry dock, as under present law, *and is extended to include an employer of such employees in such employment on any adjoining pier, wharf, terminal*, ...

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 14 (1972), *reprinted in* U.S. Code Cong. & Admin. News 1972, p. 4711 (emphasis added).

IV

The order of the Benefits Review Board will be affirmed. Pursuant to 33 U.S.C. §928, Molee's counsel has requested $2,739.25 in attorney's fees in the event that Molee's claim is successful. The petitoners have not opposed this request, and it will be granted.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Opinion of he Benefits Review Board

(Filed—June 22, 1982)

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

No. 80-1164

ANTHONY MOLEE

Claimant-Respondent

v.

NOVELTIES DISTRIBUTION CORPORATION

and

NEW JERSEY MANUFACTURERS INSURANCE COMPANY

Employer/Carrier-Petitioner

DECISION AND ORDER

Appeal from the Decision and Order of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Appendix B

George J. Duffy (Baker, Garber, Duffy & Baker, P.C.), Hoboken, New Jersey, for the claimant.

Leonard J. Linden (Linden & Gallagher), New York, New York, for the employer/carrier.

Before: RAMSEY, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

RAMSEY, Chief Administrative Appeals Judge:

This is an appeal by the employer/carrier (hereinafter, employer) from the Decision and Order (79-LHCA-1966) of Administrative Law Judge Frederick D. Neusner pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter, the Act). The sole issue on appeal involves claimant's coverage under Section 2(3) of the Act. 33 U.S.C. §902(3).

Claimant worked as a "location man" or "checker" for employer, Novelties Distribution Corporation, at Berth 78. Vessels which dock at Berth 78 are unloaded by employees of Maher Terminals, Inc. Novelties Distribution Corporation, a wholly owned subsidiary of Maher Terminals, is engaged in the movement of lumber from the "stringpiece," where the lumber is placed immediately after unloading, to storage areas where it is held for pick up by the consignees. Employer acts as the agent of the consignee. Claimant's work involved directing the placement and movement of lumber from the stringpiece to storage in employer's facility. Claimant was injured while engaged in this work when hit by a hi-lo truck carrying lumber to the storage area.

Appendix B

The administrative law judge found claimant's work essential to the longshoring process and, therefore, covered by Section 2(3). Employer appeals, arguing that its work involves only the initial steps in land transportation and, therefore, claimant was not engaged in maritime employment.

The Board's scope of review is limited. The decision of the administrative law judge must be affirmed if it is supported by substantial evidence in the record considered as a whole, rational and is in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe* v. *Smith, Hinchman & GryllsAssociates, Inc.*, 380 U.S. 359 (1965).

We affirm the administrative law judge's finding that claimant was engaged in longshore operations and therefore is covered by Section 2(3).* The administrative law judge recognized that employer's contention that claimant was involved in the first step of land transportation is necessarily premised on the "point of rest" theory rejected in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), and *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979). As applied to the instant case, the "point of rest" theory would extend coverage only to those employees involved in unloading lumber from the ship to the stringpiece, the first "point of rest." Coverage would not extend to employees of employer inasmuch as they are

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* Section 2(3) provides, in pertent part:

> The term "employee" means any person engaged in maritime employment, including an longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . .

engaged in picking up the lumber from the stringpiece and moving it to storage areas to await further transshipment.

Employer contends that the administrative law judge erred in finding that the instant case involves the "point of rest" theory and asserts that excluding its employees from coverage is consistent with the result in *Ford, supra.* Employer points out that its work involves only moving lumber from the stringpiece landward to storage areas for delivery to the consignee. Thus, employer relies on the fact that none of its employees actually unload vessels, and characterizes itself as a lumberyard located on the waterfront for its customer's convenience. We do not accept employer's analysis.

In *Ford,* the Court held two employees, Ford and Bryant, covered by Section 2(3), finding that each was engaged in an intermediate step in the loading process. Claimant Ford was injured while fastening cars which had been unloaded and stored for several days onto a railroad flat car. Bryant was injured while unloading cotton received from inland/shippers and stored for several days. Bryant unloaded the cotton from a dray wagon into a pier warehouse. Claimant's work herein was similar to that of Ford and Bryant. *See also Cooper* v. *John T. Clark and Son of Maryland, Inc.,* 11 BRBS 453 (1979). The result urged by employer would be contrary to these holdings.

It is not necessary that employees actually unload vessels in order to be covered by the Act. Employer's employees work in concert with those of Maher Terminals in an integrated operation which combines the various steps

involved in unloading a vessel and shifting cargo to the point where it is picked up for land transportation. The fact that two corporations have been formed to handle these steps does not alter the nature of the work involved. *See Perez* v. *Sea-Land Services, Inc.*, 8 BRBS 130 (1978). To hold otherwise would, as the administrative law judge found, reinstate the point of rest theory.

Therefore, we hold that claimant's work facilitating the transportation of lumber from the stringpiece to the storage area, involved an intermediate step in the unloading process. Claimant was properly held covered by Section 2(3).

Claimant's attorney has submitted a fee petition for 7½ hours of work performed before the Board, at the rate of $150 an hour, for a total of $1,125. Employer objects on the basis that the requested hourly rate is too high and that certain time expenditures are excessive. Employer states that a fee of $650 is reasonable.

We hold that on the facts of this case, $150 an hour is a reasonable hourly rate in Hoboken, New Jersey, and that the time spent by counsel on this case was appropriate, considering the quality of the work performed, the complexity of the issues and other relevant factors. *See* 20 C.F.R. §802.203. We therefore grant the requested fee of $1,125.

Accordingly, the administrative law judge's Decision and Order is affirmed. Employer is directed to pay an attorney's fee of $1,125 directly to claimant's attorney.

Appendix B

SO ORDERED.

ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

We Concur:

JULIUS MILLER
Administrative Appeals Judge

ISMENE M. KALARIS
Administrative Appeals Judge

Dated this 22nd day
of June 1982

APPENDIX C

Opinion of the Administrative Law Judge

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 79-LHCA-1966

OWCP No. 2-54767

In the Matter of

ANTHONY MOLEE

Claimant

vs.

NOVELTIES DISTRIBUTION CORP.

Employer

and

N.J. MANUFACTURERS INSUR. CO.

Carrier

George J. Duffy, Esq.
For the Claimant

Leonard Linden, Esq.
For the Employer/Carrier

Appendix C

Before: Frederick D. Neusner
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act (33 USC 901, *et seq.*) herein referred to as "the Act", and the regulations governing its administration. (20 CPR 701, *et seq.*)

The record transmitted by the Deputy Commissioner contains a prehearing statement by the Claimant, but none by the Employer/Carrier. The Claimant states that the issues to be whether or not the parties are within the jurisdiction of the Act and whether or not the Claimant is permanently and totally disabled. At the formal hearing, the parties by stipulation indicated that disability was no longer at issue. Therefore, the sole remaining issue before me is whether or not the Claimant's status was covered as maritime employment within the meaning of the Act.

STIPULATIONS

At the hearing in New York City, New York, on March 6, 1980 the parties were both represented by counsel. The parties stipulated the facts hereinafter set forth.

Except as contested in the issue noted, for all other purposes of jurisdiction the Claimant and Employer were in an employee-employer relationship on August 11, 1977, when Claimant suffered an injury that arose out of and in the course of that employment. The Employer had timely notice of the injury. Subsequent to Claimant's timely claim for compensation, the Employer filed a notice of contro-

version on March 20, 1978, and a first report of accident on March 21, 1978. The Claimant has incurred a temporary total disability from August 12, 1977 through February 16, 1979. As of February 17, 1979, Claimant's disability became permanent and total.

At the time of the injury, Claimant's average weekly wage was $340.00 and his rate of compensation under the Act was $226.67.

The Employer voluntarily paid Claimant $5,934 for temporary total disability and $3600 for permanent partial disability, a total of $9,534. The parties agreed that those payments were made under the workmen's compensation statute of the State of New Jersey and not under the Act.

The Employer has paid for medical services furnished the Claimant in connection with this injury. These medical payments were not made pursuant to the Act based on Employer's stated reservation of the issue of jurisdiction and coverage.

The Employer, Novelties Distribution Corp., is a wholly owned subsidiary of Maher Terminal, Inc. Previously, Maher Stevedoring Co., Inc. on July 21, 1971 changed its name to Maher Terminal, Inc. Thereafter, on February 28, 1974, Distribution Transport, Inc., merged into Maher Terminal, Inc. On March 30, 1976, Maher Distribution Center, Maher Lumber Terminal and Port Service, Inc., merged into Novelties Distribution Corp.

Claimant's Employment

Novelties Distribution Corp., the named Employer, is in the business of receiving, warehousing and distributing lumber. The parent company, Maher Terminals, Inc., is in the business of stevedoring.

Appendix C

In the process of unloading cargo, lumber, chained down on the top deck of the ship during passage, is taken off by longshoremen. The lumber is then lowered in bundles to the stringpiece. Once on the stringpiece, the bundles of lumber are placed on hi-lo's in order to be taken to the storage area on the pier.

The Claimant would be stationed in the middle of this storage area, which was located continguous to the stringpiece. Classified as a checker or location man, Claimant's duty was to determine exactly where each bundle was to be placed and to direct the longshoremen in the placement of the lumber within this pier storage area. The accident took place on August 11, 1978 when the Claimant was struck by one of the hi-lo's while he was engaged in directing such placements of off-loaded cargo.

The Employer contends that the Claimant's work has no traditional or actual nexus to the sea or to longshore operations.

JURISDICTION

Under the Act, jurisdiction must be detremined on the basis of the "status" of the employee, 33 USC §902 (3) and the "situs" of the injury, 33 USC §903(a). Employer does not dispute the place where the accident occurred.

Employee

As to status, coverage under the Act is limited to any person engaged in maritime employment, including any Longshoreman or other person engaged in longshoring

operations, 33 USC 902(3). In this case, the issue is whether the Claimant was engaged in maritime employment as opposed to land-based activities.

The Employer in this case, Novelties Distribution Corp., is in the business of receiving, warehousing and distributing lumber. Claimant is a checker, or location man, whose duties are encompassed by directing the placement of lumber in Employer's pier storage area, as described above. In contending that the Claimant is not a maritime employee, the Employer places great reliance on the uniqueness of the handling of lumber, the fact that the company takes possession after the sea voyage has ended and on the Employer's status as the agent of the consignee of the lumber.

There is no authority or precedent supporting the proposition that the nature of the cargo determines the status of a worker under the Act. Further, the evidence is not persuasive that the Employer's lumber is unloaded uniquely or in a manner that sets it apart from other cargoes transported through navigable waters.

Although the Employer repeatedly states that no reliance is placed on the previously rejected "point of rest" theory, Employer's argument cannot prevail without reliance on that method of analysis. The Employer's position, when stripped of allusions to circumstantial details, is that the Act applies only to those employees engaged in the process of loading and unloading between the ship and the first point of rest, the stringpiece in this case. This concept was expressly rejected in *Northeast Marine Terminal Co.* v. *Caputo,* 432 US 249 (1977). If the Employer's argument were accepted only persons actually removing the bundles from the ship to the stringpiece along side would be covered.

Appendix C

The criterion established under the Act is not the test offered by Employer. The question to determine is whether the employee's duties are essential to longshore operations. *J.A. McCarthy, Inc.* v. *Bradshaw,* 3 BRBS 195, BRB No. 75-209 (Jan. 26, 1977) *aff'd* 547 F2d 176 (CA 5-1977), *cert. den.* 434 US 903 (1977), *aff'g* 4 BRBS 13, BRB No. 75-275 (May 18, 1976).

Clearly, Claimant played an integral and essential role in the longshore process. Like the employees in *P.C. Pfeiffer Co., Inc.* v. *Ford,* 444 U.S. 69, 100 S.Ct. 328 (1979), this Claimant was engaged in an intermediate step of moving cargo between the ship and land transportation.

The Employer has submitted copies of delivery slips signed by the Claimant who testified that most such slips referred to specific ships. Whether or not the name of the ship appears on the delivery slip, does not control my conclusion as to whether the claimant was engaged in maritime employment. Because the work of the claimant is essential to the longshore process the claimant is a covered employee under the Act. *Compare Holcomb* v. *Robert J. Kirk Associates,* 11 BRBS 835, BRB No. 78-566 (1980).

Employer

An implicit issue is whether respondent was an employer within the meaning of the Act. Novelties Distribution Corp. is an employer because its employes in Claimant's class are engaged in maritime employment in whole or in part, upon the navigable waters of the United States (including any railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). 33 USC 902(4). If this respondent did not have

any employees engage in the forms of maritime employment contemplated by the Act, it would be appropriate to conclude otherwise. *Napoles* v. *Donzi, Marine, Inc.*, 5 BRBS 685, BRB No. 76-262. This is not questioned in this case.

Respondent's status is defined by construing the work of its employees, the employment relationship having been established. *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F2d 533, 538 n. 9 (CA 5-1976); *Thompson* v. *Oceanic Container Service, Inc.*, 5 BRBS 831, BRB No. 76-294 & 76-294A (May 12, 1977). Since Claimant was engaged in maritime employment and was found to be an employee within the meaning of the Act, it follows that respondent was an employer under the Act, regardless of the details of organization, contract or nomenclature on which Novelties Distribution Corp., may rely to define its role in the world of commerce. The relationship of Novelties with Maher Terminal, Inc. does not define its status. But the function of this firm within the conglomerate enterprise lends perspective to an appraisal of its roll in the business group and its use of the pier where ships unloaded.

Situs

Finally, it must be concluded that the Claimant was injured on a "situs" covered by the Act. The record is clear that the injury took place in a area customarily used to store lumber temporarily prior to its being picked up for further shipment to the buyer.

The Employer argued that because it considers itself the agent of the consignee of the lumber such cargo was no longer in maritime commerce since at such time it had been picked up for further shipment by Novelties Distribution Corp. See *Avvento* v. *Hellenic Lines, Ltd.* 1 BRBS 174,

BRB No. 74-153 (Nov. 12, 1974). The marshalling yard is an adjoining area "customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U.S.C. 903(a) So the employer's definition of its own commercial role cannot determine its employee's right to benefits under the Act. "Further, the 1972 amendments to the Act expressly extend coverage under Section 3(a) of the Act to the entire terminal area. See *Mininni* v. *Pittston Stevedoring Corp. and Guld Insurance Company,* 1 BRBS 428, BRB Mp/74-195 (May 1, 1975). The court in *United States* v. *Knight,* 451 F.2d 275 (5th Cir. 1971), *cert. denied,* 405 U.S. 965 (1972), defined terminal to include yards and storage facilities. *Cf. Adkins* v. *I.T.O. Corporation of Baltimore,* 1 BRBS 199, BRB No. 74-123 (Nov. 29, 1974). I therefore hold that the situs of the accident, occurring in the marshalling yard within the employer's terminal falls within the coverage of Section 3(a) of the Act, as amended." *Capelluti* v. *Sea-Land Service, Inc. et al.,* 1 BRBS 527, 530-531, BRB No. 75-123 (June 10, 1975).

It is admitted that the place where Claimant worked was part of the land area of the terminal and was in a pier. (Cl. Ex. 1). The undisputed testimony is that this was being used as a marshalling yard in the sequence of events in the offloading process.

Since Claimant was an integral part of the unloading function in a place the employer used to marshall the cargo and which the employer called by name a terminal, respondent's argument challenging the Act's jurisdiction of this Claimant's injury and benefits cannot be accepted.

The Claimant has established the statutory elements necessary to demonstrate that his injury was within the jurisdiction of the Act.

Appendix C

COMPENSATION AND BENEFITS DUE UNDER THE ACT

Based on the entire record and on the stipulations hereinabove discussed, the Claimant is found to have suffered a compensable injury arising out of and in the course of his employment by the Employer on August 11, 1977.

That injury resulted in temporary total disability from August 12, 1977 to February 16, 1979, and in permanent total disability as of February 17, 1979.

Claimant's average weekly wage is $340.00 per week; his compensation rate is $226.67. Employer has paid Claimant $9,534.00 as voluntary compensation, consisting of $5,934 as temporary total disability and $3600 as permanent partial disability. Such payment were made under authority of the workmen's compensation laws of the State of New Jersey and not under the Act.

Attorney Fees

I have received a fee request application from the Claimant. In order to consider fully the merits thereof, the fee will be ordered in a Supplemental Decision and Order.

ORDER

1. Subject to offset and deduction for payments voluntarily made, the Employer/Carrier shall pay to the Claimant benefits for temporary total disability at the rate of $226.67 per week, for the period beginning August 11, 1977 and ending February 16, 1979.

2. Subject to offset and desuction for payments voluntarily made, the Employer/Carrier shall pay to the Claimant benefits for permanent total disability at the rate of $226.67 per week commencing as of February 17, 1979.

3. The Employer/Carrier shall make payments as required by 33 USC 907 to compensate for the cost of medical services and supplies furnished Claimant in connection with this job related injury.

4. The Employer/Carrier shall pay to Claimant's counsel such fee as shall hereinafter be ordered pursuant to the application for approval of attorney fee submitted by counsel for Claimant.

FREDERICK D. NEUSNER
Administrative Law Judge

Dated: Sep 16 1980
Washington, D. C.

APPENDIX D

Text of 33 U.S.C. Secs. 902(3) and (4), 33 U.S.C. Sec. 903(a), 33 U.S.C. Sec. 921(b)(3) and 28 U.S.C. Sec. 1254

33 U.S.C. Secs. 902(3) and (4).

(3) The term "employee" *means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any habor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term* does not include a master or member of a crew of any vessel, *or* any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading unloading, repairing, or building a vessel*).

33 U.S.C. Sec. 903(a).

Composition shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*).

Appendix D

33 U.S.C. Sec. 921(b)(3).

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

28 U.S.C. Sec. 1254.

Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

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NO. 83-538

Office-Supreme Court, U.S.
FILED
OCT 19 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NOVELTIES DISTRIBUTION CORPORATION and NEW JERSEY MANUFACTURERS INSURANCE COMPANY,

Employer/Carrier Petitioners,

v.

ANTHONY MOLEE and DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Claimant and Federal Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF CLAIMANT RESPONDENT ANTHONY MOLEE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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NO. 83-538

IN THE

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BRIEF OF CLAIMANT RESPONDENT ANTHONY MOLEE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

Anthony Molee was working for Novelties Distribution Inc. as a "checker" or "location man" on August 11, 1978 at Berth 78, Elizabeth Port Authority Marine Terminal [31, 35, Ex. 1, 27].

Lumber in bundles were being discharged from the vessel EMMA JOHANNA at Berth 78 by "longshoremen" (Maher Terminals, Inc. employees, [70]) by lowering the bundles to the stringpiece by ship's gear.* Claimant testified:

> "Once it is on the stringpiece our fellas from Novelties would come with the lift trucks, pick it up and bring it to me, and I would be stationed somewhere in the middle, and I would tell them,—I would look at how many pieces to the lot, how many packages, and then I would determine where to put in on the berth."
>
> [24, 31]

The accident occurred as follows:

> "Well I was standing on the berth, on Berth 78, waiting for these machines, it was around 1:30 in the afternoon, and the reason I can tell you that is they said I was eating an orange, and the orange come out of my mouth, so we just got through eating, and I don't know what happened, all I know is I found myself on a stretcher, they tell me I had a tire mark on my back, and I had the papers in my hand, and I am looking at papers, waiting for the machines to come towards me, and they are coming towards me,

---

* "Shift" on TR. p. 18, l. 3 [24] should read "ships" gear.

I am just waiting so I could figure where I'm going to put what, and the next thing you know, I was hit.

After all .when these tires go over you, you don't know what hit you."

[32]

Claimant Molee was struck down and run over by a hilo operated by Clarence Johnson, a Novelties employee who had been one of the 15 drivers taking lumber from the end of the ship's tackle on the stringpiece to the storage area on Berth 78. [32, 33]. The only activity carried on Berth 78 when a vessel was in was discharge of the vessel [48] and Novelties employees took possession of the lumber cargo when "it hits the stringpiece off the ship." [64].

Novelties does not operate a "lumber yard" at Elizabeth P.A. Marine Terminal. (Petitioner's Brief, pp. 4 et seq.). It operates the largest terminal on the East Coast for lumber, which is imported from the West Coast of Canada. No rail cargo is discharged at Berth 78 [63] where claimant Molee worked for 14 years.

Petitioner's disability was stipulated [16] and he is permanently and totally disabled.

Reason for Denying Writ of Certiorari

The Petition for Certiorari should be denied because it does not set forth any reason for granting certiorari. It is a restated brief on the merits, and as such is inappropriate, to say the least. There has been no attempt by the Petitioner to comply with the basic requirements of Supreme Court Rule 19. The facts are not disputed, and no novel or precedential issues are presented with respect to coverage under the Longshoremen's and Harbor Workers'

Compensation Act. Exsting case law amply covers the issue of jurisdiction as to the status of claimant as a maritime employee under sec. 2(3) of the Act, 33 U.S.C. sec. 902(3).

The effort by Petitioners to make a distinction as to claimant Molee's status under the Act is predicated on a record that is barren as respects support for the proposition that Novelties acts as "agents for the consignees." The Third Circuit Court of Appeals noted this discrepancy at Footnote 2:

> "The record on the question of agency is undeveloped. and the ALJ made no findings on this issue. The Board conclusorily stated that Novelties "acts as the agent of consignee." App. 91. Because we hold that Molee's claim falls within the Act, even if he is an agent of the consignees, we will express no view on the agency issue or on the stage at which the consignees obtain possession." (710 F2d 992, 994).

The findings and rulings of the Administrative Law Judge that the claimant Molee and the employer are within the coverage of the Longshoremen and Harbor Workers' Compensation Act were unanimously affirmed both by the Benefits Review Board and the Third Circuit Court of Appeals. There is nothing controversial or special about this case which would warrant recognition by the Supreme Court. The only remarkable thing about this case is the Petitioners' unwillingness to accept the result.

Claimant respondent Molee adopts and rests his case on the legal analyses and rulings of the Administrative Law Judge, the Benefits Review Board, and the Third Circuit Court of Appeals, all of which are set forth in the Appendix to the Petition.

CONCLUSION

There being no grounds stated why Writ of Certiorari should issue, the Petition should be denied.

Attorney's Fees

As an outgrowth of the ruling by the Benefits Review Board in *Mazzella* v. *United Terminals, Inc.*, 8-BRBS-755, reaffirmed on reconsideration 9-BRBS 191, and other cases such as *Owen* v. *Newport News Shipbuilding and Dry Dock Co.*, 11-BRBS-409, we are required to present a fee request to the Supreme Court, to be assessed against the Carrier/Employer for our legal services on behalf of claimant in opposing the Petition. In the event the Petition is denied, or in the event the decision below is affirmed after the granting of Certiorari, we are entitled to be paid as the Court directs and affirms.

Accordingly, we have appended to this Brief in Opposition our request for fees and reimbursement of expenses, and request that same be allowed under secs. 28 of the Act.

We must comment, however, that it is not in the best interests of the efficient administration of justice that the Supreme Court be bothered with attorney fee requests. Nor do we think that in LHWCA cases should the various Circuit Courts of Appeals, or the Benefits Review Board be burdened with separately evaluating, approving and fixing of attorneys' fees. Awarding an attorney fee is essentially a fact-finding process which is best suited to a trial court, which in this instance would be the Office of Administrative Law Judges. The appellate tribunals should declare policy, interpret the law, establish standards and review legal issues, and not be bothered with such ministerial matters. We therefore invite the Court to invoke its general

rule-making authority and direct that our fee request be remanded to the Office of Administrative Law Judges for appropriate action. We further invite the Court to declare that all issues and requests for Attorneys' fees under sec. 28 of the Longshoremen's Act be in first instance resolved *nisi prius* before the Office of Administrative Law Judges, subject to the appeal jurisdiction of the Benefits Review Board. Also, disputes regarding fees awarded by the Deputy Commissioner at the informal level, should be first reviewed by the Office of Administrative Law Judges, and not be required to be appealed direct to the Benefits Review Board as the present practice requires. (cf. *Hensley* v. *Washington Metropolitan Area Transit Authority*, 655 F. 2d 264, C.A.D.C., 1982)

Respectfully submitted,

MILTON GARBER
Counsel for Claimant-Respondent

GEORGE J. DUFFY
BAKER, GARBER, DUFFY & GARBER
A Professional Corporation
Of Counsel

APPENDIX A

Request for Claimant Respondent's Counsel Fee on Brief in Opposition to Petition for Certiorari.

½ hr. Receipt of Petition for Certification; review of Judgment of Affirmance Third Circiut Court of Appeals; letter to Clerk of Supreme Court inquiring as to date of filing of Petition to ascertain whether 90-day filing time limit was met. September 29, 1983.

6 hrs. Review of Petition, review decisions below, review of Supreme Court Procedures, preparation, drafting and concluding Brief in opposition. October 5, 1983.

1 hr. Review and proofreading of Brief in opposition. October 14, 1983.

Baker, Garber, Duffy & Baker respectfully requests that counsel fee of 1,125.00 for seven and one-half hour time at an hourly rate of $150.00 be awarded and assessed against employer/carrier. All services in this matter were performed by George J. Duffy and the rate previously charged by this office and allowed in this matter is $150.00 per hour. The present rate charged by our office is computing hourly charges in contingent compensation matters is now higher. Request is also made for assessment against the Carrier/Employer for reimbursement of printing charges Adams Press Corp. in the amount of $509.80.

MILTON GARBER
Attorney for Claimant-Respondent

Office - Supreme Court, U.S
FILED
DEC 15 1983
ALEXANDER L. STEVAS
CLERK

No. 83-538

In the Supreme Court of the United States

OCTOBER TERM, 1983

NOVELTIES DISTRIBUTION CORPORATION AND NEW JERSEY MANUFACTURERS INSURANCE COMPANY, PETITIONERS

v.

ANTHONY MOLEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Whether an employee, injured while directing the movement and placement of off-loaded lumber from the edge of a dock to a pier storage area, was "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3).

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 710 F.2d 992. The opinion of the Benefits Review Board (Pet. App. 15a-20a) is unreported. The decision and order of the administrative law judge (Pet. App. 21a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1983. The petition for a writ of certiorari was filed on September 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 902(3), provides in pertinent part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker * * *.

Section 2(4) of the LHWCA, 33 U.S.C. 902(4), provides that:

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a) of the LHWCA, 33 U.S.C. 903(a), provides in pertinent part:

> Compensation shall be payable under this [Act] in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel) * * *.

STATEMENT

Petitioner Novelties Distribution Corporation, a wholly owned subsidiary of Maher Terminals, Inc., is in the business of receiving, warehousing, and distributing lumber at a

port in Newark, New Jersey (Pet. App. 3a, 16a, 25a).[1] Novelties' lumber operation occupies two areas: Berth 78, a 10-acre area directly adjacent to the water, and a 26-acre "Bay Avenue Area," 2,500 feet inland (*id.* at 3a). When a ship is anchored at Berth 78, Maher's employees unload the lumber from the vessel onto the "stringpiece," *i.e.*, the edge of the dock closest to the ship (*id.* at 3a, 16a, 24a). Novelties' employees then place the lumber on hi-lo trucks and move it from the stringpiece to Novelties' pier storage area, where the lumber is held for consignees (*ibid.*).

Respondent Anthony Molee was employed as a checker or location man for Novelties (Pet. App. 3a, 16a, 25a). Molee spent virtually all his working time on Berth 78 (*id.* at 3a).[2] Molee's usual job was to direct the movement of lumber from the stringpiece to the storage area (*id.* at 3a, 16a, 24a-25a). Molee's "work was always checking, checking trucks, checking the lumber off the ship" (*id.* at 3a). Although Molee would sometimes work alongside the stringpiece, "any movement he may have made would end at the water's edge" (*ibid.*). On August 11, 1978, while performing his usual duties, Molee was struck by a hi-lo truck carrying lumber from the stringpiece to the storage area and was seriously injured (*id.* at 3a, 16a, 24a).

Novelties made voluntary payments to Molee under the New Jersey Workmen's Compensation Act (Pet. App. 23a). Molee then filed a claim for benefits under the Longshoremen's and Harbor Worker's Compensation Act. The administrative law judge (ALJ) approved Molee's claim (Pet. App. 24a-30a), finding that he satisfied the jurisdictional prerequisites for coverage under Sections 2(3) and 3(a) of

---

[1]The other petitioner, New Jersey Manufacturers Insurance Company, is Novelties' insurance carrier.

[2]He spent, at most, one day a year at the larger area taking inventory (Pet. App. 3a).

the LHWCA, 33 U.S.C. 902(3) and 903(a). The ALJ found that Molee was injured on a "situs" covered by Section 3(a) of the Act because the injury took place in an area adjoining navigable waters that was customarily used by an employer in unloading a vessel (Pet. App. 27a-28a). Moreover, Molee satisfied the "status" requirement of Section 2(3) because he "was engaged in an intermediate step of moving cargo between the ship and land transportation," and "played an integral and essential role in the longshore process" (Pet. App. 26a). The ALJ finally determined (*id.* at 26a-27a) that Novelties was an "employer" under Section 2(4) of the Act, 33 U.S.C. 902(4), because Molee was a covered employee.[3]

Petitioners appealed the decision and order of the ALJ to the Benefits Review Board pursuant to 33 U.S.C. 921(b)(3). The Board affirmed the ALJ, finding (Pet. App. 18a-19a) that Molee was engaged in an intermediate step in the unloading process, similar to the claimants in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979).[4]

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[3]The ALJ stated (Pet. App. 27a):

> Since Claimant was engaged in maritime employment and was found to be an employee within the meaning of the Act, it follows that * * * [Novelties] was an employer under the Act, regardless of the details of organization, contract or nomenclature on which Novelties Distribution Corp., may rely to define its role in the world of commerce.

[4]The Board explained that an employee need not actually unload vessels to be covered by the LHWCA (Pet. App. 18a-19a) (citation omitted):

> Employer's employees work in concert with those of Maher Terminals in an integrated operation which combines the various steps involved in unloading a vessel and shifting cargo to the point where it is picked up for land transportation. The fact that two corporations have been formed to handle these steps does not alter the nature of the work involved. To hold otherwise would, as the administrative law judge found, reinstate the point of rest theory [rejected in *P.C. Pfeiffer*].

The court of appeals thereafter affirmed the Board (Pet. App. 1a-14a).[5] The court held that Molee was "engaged in maritime employment" within the meaning of Section 2(3) and that Novelties was an "employer" under Section 2(4) of the Act.

The court of appeals concluded that Molee was a covered "employee" under the Act regardless of Novelties' contention that Molee was employed by an agent of the lumber consignees rather than a stevedoring company (Pet. App. 4a-11a). The court of appeals observed that in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 274-279 (1977), and in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. at 75, this Court "decisively reject[ed] the 'point of rest' theory that maritime employment includes 'only the portion of the unloading process that takes place before the stevedoring gang places cargo onto the dock' " (Pet. App. 6a). The court of appeals further concluded that "[w]hether or not the Supreme Court's rejection of the point-of-rest idea is itself dispositive, the reasoning of *Caputo* and, to an even greater extent, *Ford* make clear that Molee is an employee covered by the statute because he is 'engaged in longshoring operations' " (*id.* at 7a).

The court of appeals then rejected petitioners' contention that this case is distinguishable from *Ford* because Novelties has a separate corporate identity from Maher, the stevedoring company (Pet. App. 4a-5a, 9a). The court held (*id.* at 11a-13a) that Novelties was a covered "employer" under the plain language of Section 2(4) of the Act, 33 U.S.C. 902(4). The court further noted that *Ford* makes it "clear that the test of coverage is to be simple and uniform and not manipulable at the employer's whim" because the

---

[5]The Director, Office of Workers' Compensation Programs, United States Department of Labor, appeared as a party respondent in the court of appeals and filed a brief in support of Molee (Pet. App. 2a).

controlling factor is "the actual nature of the tasks performed" rather than the "employer's legal relations" (Pet. App. 9a).

ARGUMENT

The court of appeals correctly resolved the LHWCA coverage issue in this case. As the court concluded, an employee injured while directing the movement and placement of lumber from the edge of a dock to a pier storage area is engaged in an intermediate step in the maritime unloading process and satisfies the Section 2(3) status test of the LHWCA. The court also correctly held that the employer of an employee who meets the Section 2(3) status test automatically qualifies as an "employer" under Section 2(4) of the Act. The decision below does not conflict with any decision of this Court or of any other court of appeals and further review is unwarranted.

1. This case is controlled by two decisions of this Court dealing with the landward reach of the 1972 amendments to the LHWCA, *Northeast Marine Terminal Co.* v. *Caputo, supra,* and *P.C. Pfeiffer Co.* v. *Ford, supra.* In *Caputo,* 432 U.S. at 266-267 (footnote omitted), this Court examined the legislative history of the 1972 amendments and concluded that Congress "inten[ded] to cover those workers involved in the essential elements of unloading a vessel — taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area." This Court held, therefore, that claimants who were injured while "engaged in the handling of cargo as it moves between ship and land transportation after its immediate unloading" were covered employees under Section 2(3) (432 U.S. at 267, 268-274). In *Ford,* 444 U.S. at 82-83 (footnote omitted), this Court similarly held that land-based workers "engaged in intermediate steps of moving cargo between ship and land transportation" were "engaged in maritime

employment" because "worker[s] responsible for some portion of that activity [are] as much an integral part of the process of loading or unloading a ship as [are] person[s] who participate[] in the entire process." [6]

Molee, a checker or location man, was injured while engaged in his normal duties of directing the movement and placement of off-loaded lumber from the stringpiece to the pier storage area. Thus, as the court of appeals correctly determined, Molee was involved in an intermediate step in the unloading process and was clearly engaged in maritime employment under Section 2(3).[7]

2. Petitioners contend (Pet. 8-14), however, that this case is distinguishable from *Caputo* and *Ford* because Novelties, although a wholly owned subsidiary of a stevedoring

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[6]As the Court explained (444 U.S. at 81) (footnote omitted):

> [T]he usual longshoring crew includes some men whose duties may be carried out solely on the land. A typical loading gang consists of persons who move cargo from a warehouse to the side of a ship, frontmen who attach the load to the ship's gear for lifting aboard the vessel, and a hold gang which stores cargo inside the ship. Although the workers who carry the cargo to shipside and the frontmen who attach the cargo to the lifting devices need not board a ship to carry out their duties, they are incontestably longshoremen directly engaged in the loading process.

[7]Petitioners contend (Pet. 17) that the court of appeals' conclusion that Molee was a "checker" is not supported by substantial evidence. The administrative law judge, however, found that "[c]laimant is a checker, or location man, whose duties are encompassed by directing the placement of lumber in Employer's pier storage area" (Pet. App. 25a). In any event, a worker's job title is not dispositive of his status as an employee under Section 2(3). Rather, "the crucial factor is the nature of the activity to which a worker may be assigned." *Ford*, 444 U.S. at 82. Molee was charged with the duty of "direct[ing] the longshoremen in the placement of [off-loaded lumber] within th[e] pier storage area" (Pet. App. 24a). He played an integral and essential part in the unloading process, and, like the claimants in *Ford*, was "engaged in [an] intermediate step[] of moving cargo between ship and land transportation" (444 U.S. at 82-83) (footnote omitted).

company, acted as the agent of land-based lumber consignees. According to petitioners, once the "consignee receives [cargo] for its own land-based purposes" the "shipment ends and the maritime nature of handling cargo terminates" (*id.* at 12). According to petitioners, Novelties is merely "a traditional lumber yard operation that happens to be located near the waterfront" (*id.* at 13). This contention is without merit.

As the court of appeals correctly observed (Pet. App. 5a), petitioners' claim is an attempt to reintroduce the checkered and arbitrary coverage that Congress sought to eliminate in the 1972 amendments by extending the coverage of the Act landward. This Court has implemented congressional intent by rejecting the "point of rest" theory, under which the landward coverage of the 1972 amendments would include only that portion of the unloading process that takes place before the cargo is placed on the dock. *Caputo*, 432 U.S. at 274-279; *Ford*, 444 U.S. at 75-76; *Director, OWCP* v. *Perini North River Associates*, No. 81-897 (Jan. 11, 1983), slip op. 25.[8] As these cases make clear, employees who are integrally involved in the unloading process are covered under the Act, even if all their duties are performed on land. Just as coverage under the Act does not depend upon whether an employee belongs to a "maritime" or land-based union (*Ford*, 444 U.S. at 82), the rights of

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[8] In *Caputo*, 432 U.S. at 274-279, this Court explained that the "point of rest" theory was inconsistent with both the language and intent of the 1972 amendments because: (1) the theory was not mentioned in the Act or its legislative history; (2) the theory prevented a uniform compensation system by allowing workers to walk in and out of coverage depending upon on which side of the "point of rest" an employee was working; (3) the theory failed to cover longshoring operations that modern containerization techniques had moved onto land; and (4) the actual "point of rest" itself "varie[d] from port to port * * * with different types of cargo * * * [and could be] moved seaward or landward at the whim of the employer." 432 U.S. at 276 n.38.

employees under the Act cannot be defeated by an employer designating itself as a "lumberyard." As the court of appeals observed (Pet. App. 9a) (citations omitted):

> the test of coverage is to be simple and uniform and not manipulable at the employer's whim * * *. [A] test of coverage is unacceptable if it frustrates the congressional goals of simplicity and uniformity by making pivotal considerations like an employer's legal relations, rather than the actual nature of the tasks performed. If "the scope of maritime employment [does not] depend upon the vagaries of union jurisdiction," [*Ford*, 444 U.S. at 82; *Caputo*, 432 U.S. at 268 n.30] * * * it should be equally independent of changeable corporate structures, even if, as petitioners maintain, the separation between the work of Novelties' employees and those of Maher reflects a traditional division of labor in the handling of lumber.

Therefore, as the court of appeals correctly concluded (Pet. App. 5a n.2), even if Novelties were an agent of the lumber consignees, its employee, Molee, would be covered based upon the nature of the work he performed. Molee was not, as petitioner's imply (Pet. 8-14), an "employee[] whose responsibility is only to pick up stored cargo for further trans-shipment." He was, like the claimants in *Caputo* and *Ford*, involved in an intermediate step of the unloading process. See also *Warren Bros.* v. *Nelson*, 635 F.2d 552 (6th Cir. 1980) (truck driver who transported gravel from shipside to storage pile adjacent to factory found engaged in second step of unified process of unloading); *Walter Tantzen, Inc.* v. *Shaughnessy*, 624 F.2d 5 (2d Cir. 1980) (employee who opened, weighed and inspected cargo that had been unloaded from ship by longshoremen and that, following inspection, was moved to ultimate destination by

longshoremen held engaged in longshoring operations). Thus, the court of appeals properly determined that Molee was "engaged in maritime employment." [9]

3. Petitioners finally contend (Pet. 14-17) that because Molee did not in fact work over the water, Novelties is not an employer within the meaning of 33 U.S.C. 902(4). As the court of appeals observed, petitioners' argument may have had some force before the 1972 amendments, at which time the statute contained a narrow definition of employer and the term "navigable waters" did not "encompass land areas" (Pet. App. 11a). However, the 1972 amendments to the LHWCA greatly expanded the definition of the term "employer" to include "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier * * * or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 33 U.S.C. 902(4). As the court of appeals observed (Pet. App. 11a), petitioners' argument is therefore defeated by the plain language of the statute, because Molee was involved in unloading a vessel in an area customarily used by Novelties for such purposes.

Petitioners rely (Pet. 15-17) on an excerpt from the 1972 legislative history which states that an "individual employed by a person none of whose employees work, in whole

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[9] Petitioners suggest (Pet. 9-12) that the 1972 amendments reach only those employees engaged in traditional longshoring operations that were moved from vessel to land by the advent of containerization. In *Caputo*, 432 U.S. at 269-271, this Court explained that "[o]ne of the primary motivations for Congress' decision to extend the coverage shoreward was the recognition that 'the advent of modern cargo-handling techniques' had moved much of the longshoreman's work off the vessel and onto land." This Court also found, however, an intent to cover those employees who, like claimant Caputo, were "injured in the old-fashioned process of putting goods already unloaded from a ship or container into a delivery truck" (*id.* at 271-272).

or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." S. Rep. 92-1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. 92-1441, 92d Cong., 2d Sess. 11 (1972). The court of appeals correctly gave little weight to this statement, in light of its inconsistency with the plain language of the statute and the existence of other statements in the legislative history that confirm congressional intent to expand the definition of "employer" under the Act. See S. Rep. 92-1125, 92d Cong., 2d Sess. 17 (1972); H. R. Rep. 92-1441, 92d Cong., 2d Sess. 14 (1972). Although this Court has noted the "apparent inconsistency between the actual wording of section 2(4) and the expression in the legislative history" (*Perini*, slip op. 17 n.24), it did not, as petitioners imply (Pet. 15-16), suggest that the plain language of the statute should not be followed. Indeed, as the court of appeals observed (Pet. App. 12a-13a), "it would be extraordinary for a court to adopt a position which the legislative history merely appears to contemplate, rather than follow the statute's actual words." See *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *United States* v. *Oregon*, 366 U.S. 643 (1961).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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